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February 26, 1998

VIA OVERNIGHT MAIL
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Federal Communications Commission
1919 M Street N.W.
Washington, D.C. 20554

**Re: Commission's Request for Comments on Cheyenne River Sioux Tribe Telephone Authority's And U S West's Joint Petition For Preemption Pursuant To Section 253
CC Docket No. 98-6**

Dear Sir/Madam:

In connection with the above-referenced matter, please find enclosed the original and twelve copies of the Comment by the Fort Mojave Indian Tribe and Fort Mojave Telecommunications, Inc. In Support of the Cheyenne River Sioux Tribe Telephone Authority's and U S West's Joint Petition for Preemption with attachment.

If you require anything further, please do not hesitate to contact this office.

Sincerely,

Linda L. Doran
Secretary for John Fredericks III

cc: Nora Helton
Robert Potts
Alice Walker

Enclosures

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Attorney for Fort Mojave Indian Tribe and Fort Mojave Telecommunications Inc.

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington D.C.

IN THE MATTER OF	)	
	)	
The Cheyenne River Sioux Tribe Telephone Authority's and U S West Communications Inc.'s Joint Petition for Expedited Ruling Preempting South Dakota Law	)	CC Docket No. 98-6

COMMENT BY THE FORT MOJAVE INDIAN TRIBE AND FORT MOJAVE TELECOMMUNICATIONS, INC. IN SUPPORT OF THE CHEYENNE RIVER SIOUX TRIBE TELEPHONE AUTHORITY'S AND U S WEST'S JOINT PETITION FOR PREEMPTION

INTRODUCTION

The Federal Communications Commission (FCC) released a public notice on January 28, 1998, soliciting comments in the matter of a joint petition to preempt South Dakota law filed by the Cheyenne River Sioux Tribe Telephone Authority (Cheyenne River) and U S West Communications (U S West) (collectively, the Joint Petitioners). In their petition, the

Joint Petitioners seek to preempt enforcement of South Dakota Codified Laws § 49-31-59 (SDCL § 49-31-59) as to Indian Tribes. The Joint Petitioners argue that SDCL § 49-31-59, requiring the South Dakota Public Utilities Commission (SDPUC) to approve any sale of a telephone exchange, "violates the terms, requirements and purposes of the Communications Act" as applied to Indian Tribes and Tribal entities for transactions on Indian reservations.

The Fort Mojave Indian Tribe (FMIT) is a federally recognized Indian tribe whose reservation is located in parts of Arizona, California and Nevada on the Colorado River south of Laughlin, Nevada. The Fort Mojave Telecommunications, Inc., (FMTI) is 51% owned by the Tribe and was created under tribal law to provide telecommunications services on the reservation. Both the Tribe and FMTI fully support the Joint Petitioners' argument in its entirety. In addition, the Tribe and FMTI hereby submit the following statement in support of the Cheyenne River and U S West petition to preempt South Dakota law.

DISCUSSION

The SDPUC cannot assert regulatory authority over the sale of the telephone exchange between the Joint Petitioners because, as argued by the Joint Petitioners, it is preempted by federal law. Furthermore, an assertion of regulatory authority by the SDPUC would infringe on Cheyenne River Sioux Tribe's right to make their own laws and be ruled by them. In general, states have no jurisdiction in Indian Country when it would infringe upon the Tribes= right to make their own laws and be governed by them. Williams v. Lee, 358 U.S. 217, 220 (1959). In Williams, a non-Indian operating a store on an Indian reservation brought suit against an Indian debtor in State court to collect for goods sold by credit on the Navajo Indian Reservation. Id. at 218. The Indian defendant moved to dismiss on the grounds that the State court lacked jurisdiction and that proper jurisdiction lay in the tribal court. Id. at

218. The Supreme Court held that the State court lacked jurisdiction over the action. Id. at 223. In its opinion, the court stated: "Congress has ... acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." Id. at 220. Furthermore, the court stated that "[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." Id. at 223.

The exchanges to be sold are located within the boundaries of two Indian reservations. Presumably, the sales have been approved by the two tribal governments within whose jurisdiction the telephone companies operate. In such a case, subjecting the Tribes to the conflicting authority of the SDPUC undermines the Tribes' right to govern their respective affairs on the reservation, i.e., to regulate and approve the sale of a telephone exchange to a tribal entity. Therefore, under Williams, South Dakota cannot assert regulatory authority and require SDPUC approval or veto of the sale since it would conflict with a valid tribal governmental action approving the sale. *See also* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

When an Indian reservation is set aside by treaty or executive order for the undisturbed use and occupation of an Indian tribe, the Tribe reserves civil jurisdiction exclusive of the exercise of state jurisdiction over its reservation. In Babbitt Ford, Inc v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983), *cert. denied,* 466 U.S. 926 (1984), the court upheld the Navajo Tribal Court's jurisdiction over an action filed by a tribal member against non-Indians who had repossessed the tribal member's vehicle on the reservation in violation of tribal law.

Relying on Williams, McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973), and United States v. Wheeler, 435 U.S. 313 (1978), the court stated:

> The tradition of Indian independence, coupled with the general rule that "doubtful treaty expressions are to be resolved in favor of the Indians," has led the Supreme Court to conclude that the reservation of land to the Navajos by these treaties establishes Navajo lands as *within the exclusive sovereignty of the tribe under general federal supervision.*

Babbitt, 710 F.2d at 597 (emphasis added) (citations omitted).

Under treaties with the United States establishing their respective reservations, the Cheyenne River and Standing Rock Sioux Tribes, like the Navajo Tribe, reserved their exclusive authority over their reservation lands, subject to federal supervision. The assertion by the SDPUC of jurisdiction over an on-reservation transaction approved by tribal law would unlawfully violate the Tribes' treaty protected sovereignty.

Finally, in a case directly analogous to these proceedings, the Federal District Court in the District of Arizona found that Mohave County lacks authority to issue franchises for cable television on the Fort Mojave Indian Reservation. Fort Mojave Television, Inc., et al. v. Ward, 22 ILR 3191 (D. Ariz., May 24, 1995) (a copy of the case is attached). In Ward, Mohave County, under the auspices of state law, attempted to assert regulatory authority over a franchise agreement proposed by Fort Mojave Television, Inc. (FMTV) to construct and maintain a cable television system, both on and off the reservation. Id. FMTV conceded that operations off the reservation would be subject to county jurisdiction, but contended that Mohave County had no regulatory authority over its operations on the reservation. Id. at 3192.

The Ward court found that federal law preempted the County's regulatory authority on the reservation "because the county's interests... are outweighed by strong federal and tribal interest implicated by these circumstances." Id. at 3194, 3195. The court placed great reliance on the "strong federal interest in promoting tribal self-government and economic development." Id. at 3193. The court distinguished the case from other infringement/ preemption cases, which tended to be state tax cases, because the case implicated more than just a desire of a state to impose fees or taxes based on on-reservation activity. Id. at 3195. The court opined that the Tribe's sovereign authority to regulate utilities on the reservation carried much more weight than the tax cases, as the tribal interests at stake were much greater. Id.

As in Ward, the regulation of tribal utilities are at issue here. The Tribes have a great interest in maintaining their sovereign authority over the sale of telephone exchanges within their territories, and the assertion of competing state authority would unlawfully undermine the Tribes' right to regulate and approve these transactions.

CONCLUSION

The Tribe and FMTI respectfully request that the Petition of the Joint Petitioners be granted.

DATED this 26 day of February, 1998.

Respectfully submitted,

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Attorneys for the Fort Mojave Indian Tribe

Full Text

Before HAGEN, District Judge

Order

Proceeding *pro se*, plaintiffs Liz Beth McCurtain Estel, a one-half Choctaw Indian of the Choctaw Nation of Oklahoma, and her husband, Arthur J. Estel, sue defendant "Internal Revenue" (the IRS) for various claims arising out of the IRS's assessment of tax in the amount of $1,293 on a "bonus payment of $6,700 in 1982 for [Mrs. Estel's] portion of mineral rights sale of an oil lease on restricted land" within Oklahoma and "belonging to the members of the Five Civilized Tribes" (#1). On behalf of the IRS, the United States moves to dismiss the complaint with prejudice (#8). The Estels oppose and move to strike the motion to dismiss (#11). They also move for summary judgment (#9).

Preliminarily, the court must deny the Estels' motion pursuant to Federal Rule of Civil Procedure 12(f) to strike the United States' motion to dismiss. Rule 12(f) permits the court to strike certain matter from "any *pleading*" (emphasis added). The motion at issue is not a pleading as defined by Rule 7(a). Hence, Rule 12(f) does not apply, and the Estels have provided no other valid basis or grounds upon which to strike the United States' motion.

As for the merits of the motion to dismiss, the Estels' claim based on 42 U.S.C. § 1985 is barred by the statute of limitation. Section 1985(3) borrows the forum state's statute of limitations for personal injuries. *McDougal v. County of Imperial*, 942 F.2d 668, 673-74 (9th Cir. 1991). In Nevada, the limitations period for a personal injury action is two years. N.R.S. § 11.190(4)(e). According to the complaint, the IRS completed collection of the amount at issue in 1988, yet the Estels did not bring this action until September 13, 1994. Hence, the Estels brought this action beyond the permissible limitations period, and it is barred.[1]

Likewise, to the extent the Estels seek a refund of taxes paid, this court is barred from hearing their claim. As alleged by the Estels themselves, the United States Tax Court has adjudged them deficient in the amount at issue for the year 1982. Compl. ¶ 6, ex. 2. The Estels' petition to the tax court for a redetermination of the deficiency assessment divested this court of jurisdiction to redetermine the tax liability. *Miller v. United States*, 38 F.3d 473, 476 (9th Cir. 1994). This bar is mandated by both the doctrine of res judicata, *Russell v. United States*, 592 F.2d 1069, 1071-72 (9th Cir. 1979), *cert. denied*, 444 U.S. 946 (1979), and statutory provisions of the Internal Revenue Code. *First Nat'l Bank v. United States*, 792 F.2d 954, 955 (9th Cir. 1986) (citing 26 U.S.C. § 6512(a)), *cert. denied*, 479 U.S. 1064 (1987); *Russell*, 592 F.2d at 1071 (citing 26 U.S.C. § 7422(e)).

Moreover, even if the Estels' allegations that the tax court decision resulted from deceit on the part of the IRS were to remove this bar, their action in this court would still be barred as untimely. Under 26 U.S.C. § 6532(a), no refund action may be brought "after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates." By a letter dated March 2, 1988, and sent by certified mail, the IRS informed the Estels their claim relating to the amount at issue was disallowed, and informed the Estels they had two years within which to file a suit in district court. Compl. ex. 4. The Estels filed this action on September 13, 1994. Hence, the instant action, even if not barred by the previous tax court proceeding, is barred as untimely.

To the extent the Estels claim tortious damages beyond a refund of the above taxes, those claims are nevertheless based on the assessment and collection of taxes and, as such, are barred by sovereign immunity. Not only have the Estels not alleged exhaustion of administrative remedies under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2675, *see Warren v. United States Dept. of the Interior Bureau of Land Management*, 724 F.2d 776, 777 (9th Cir. 1984), but the FTCA excludes claims "arising in respect of the assessment or collection of any tax." 28 U.S.C. § 2680(c). Nor is sovereign immunity waived by 28 U.S.C. § 1340, which the Estels cite as a jurisdictional basis for this action. *Hughes v. United States*, 953 F.2d 531, 539 n.5 (9th Cir. 1992).

Finally, the Estels' claims based on RICO fail, not only because they do not adequately allege the elements of RICO, but, more importantly, because "there can be no RICO claim against the federal government." *Berger v. Pierce*, 933 F.2d 393, 397 (6th Cir. 1991); *accord National Commodity & Barter Ass'n v. Gibbs*, 886 F.2d 1240, 1249 (10th Cir. 1989).

In sum, even construing the Estels' *pro se* complaint liberally, as the court must, *Garaux v. Pulley*, 739 F.2d 437, 439 (9th Cir. 1984), it is "absolutely clear that the deficiencies of the complaint could not be cured by admendment." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

It is hereby ordered that defendant's motion to dismiss (#8) is *granted*; plaintiffs' complaint (#1) is *dismissed with prejudice*;

It is further ordered that all other motions filed in this case are *denied* as moot.

The clerk shall enter judgment accordingly.

[1]In addition, the complaint fails to state a claim under section 1985(3) because it does not allege any facts to support the existence of a conspiracy, *Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989), and it does not allege the conspiracy was motivated by some racial or class-based, invidiously discriminatory animus, *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971), nor do the facts alleged suggest these.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

FORT MOJAVE INDIAN TRIBE, et al. v. WARD, et al.

No. CIV 94-1792 PCT EHC (D. Ariz., May 24, 1995)

Summary

The District Court for the District of Arizona holds that Mohave County does not have the authority to issue franchises for cable television service on the Fort Mojave Indian Reservation.

Full Text

Before CARROLL, District Judge

Order

The complaint in this matter was filed on August 29, 1994. The principal issue in dispute for purposes of the motions before the court is whether Mohave County has authority to issue franchises for cable television service on the segments of the Fort Mojave Indian Reservation that lie within the county. Incident to the franchise authority is the right to collect a use fee totalling five percent of gross receipts from cable service on the reservation.

On September 23, 1994, the plaintiffs filed a motion for order to show cause and preliminary injunction. A hearing was held on December 28, 1994. The parties subsequently stipulated to withdraw those motions. The parties have executed a cable television license agreement authorizing Fort Mojave Television (FMTV) to provide cable television services in the designated areas. FMTV is paying the five percent use fee for gross receipts generated off the reservation (there is no dispute as to this obligation). The five percent fee for gross receipts generated on the reservation is being paid into an interest-bearing account, pending entry of a final order by this court.

Pending before the court are the parties' cross-motions for partial summary judgment. These motions address only the question of the county's jurisdiction to issue a franchise and collect a use fee for on-reservation subscriber. The plaintiffs' other claims, alleging violations of equal protection, due process, and the first amendment, pertain to the county's alleged refusal to grant FMTV's franchise application between January 1993 and June 1994.

I. Background

For purposes of these motions, the material facts are not in dispute. The Fort Mojave Indian Tribe (tribe) is a federally recognized Indian tribe, organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.* The tribe's reservation is located within the boundaries of Arizona, California, and Nevada. Exhibit A to document number 39 is a map depicting the layout of reservation land within Mohave County. Reservation land and non-reservation land alternate in a "checkerboard" pattern throughout much of the county. All reservation lands within the state of Arizona are held in trust by the United States for the benefit of the tribe.

Plaintiff Fort Mojave Television, Inc. (FMTV) is a corporation organized pursuant to the laws of the tribe. The tribe is a 51 percent owner; the other 49 percent is owned by National Telecommunications Co., a non-Indian Oklahoma corporation.

On January 7, 1994, FMTV submitted a proposed franchise agreement to the Mohave County Board of Supervisors (Board) for construction, operation, and maintenance of a cable television system within certain unincorporated areas of Mohave County. The Board held a meeting on February 3, 1994 to determine whether to grant the franchise and decided not to grant the franchise.

On June 20, 1994, the Board approved a license agreement for construction, operation, and maintenance of a cable television system and incidental use of county rights-of-way. However, this agreement provided for imposition of Mohave County jurisdiction, the county's five percent annual use fee, and the county's regulatory standards on FMTV's activities and income generated both on and off the reservation. On July 28, 1994, FMTV executed the license agreement, subject to inserted language providing that the five percent use fee and county jurisdiction extended only to off-reservation activities and gross receipts. On August 15, 1994, the Board rejected this language.

FMTV agrees that it is subject to county jurisdiction, regulation, and the five percent annual use fee for its activities conducted outside the reservation and within the county.

Defendants contend that because of the checkerboard pattern of tribal and county land, it would not be practical or feasible for FMTV to provide cable service to most of the reservation lands in Mohave County without using county rights-of-way. Similarly, it is not practical or feasible for cable operators to serve non-reservation lands without crossing reservation lands, at least at section corners.

Approximately 600 members of the tribe live on the portions of the reservation that are within Mohave County. One reason that this case appears to be so important to both the tribe and the county is that the tribe has plans to develop two large on-reservation housing projects within Mohave County. One development is expected to house 15,000 residents; the other is expected to house 5,300 residents. It is anticipated that more than 90 percent of these new residents will be non-Indians. In addition, the defendants speculate that most cable television viewers who are transient visitors to the reservation, such as users of recreational vehicles and guests of a tribal hotel-casino, will be non-Indians. It is likely, therefore, that FMTV's gross receipts for its on-reservation service will exceed those for its off-reservation service and that most of these gross receipts will come from non-Indians.

At the hearing in December, the court asked both parties to submit supplemental memoranda addressing arrangements for cable television service on other reservations in Arizona. The information provided by the defendants—who contacted counties, municipalities, tribal representatives, and cable television companies—suggests that a dispute such as this has not previously arisen in Arizona. Based on the information provided by cable companies presently providing service on reservations, it appears that most of these companies do not have county franchises and pay fees only to the tribes for on-reservation service.

II. Discussion

The defendants argue that the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.* (Cable Act) authorizes county jurisdiction. The plaintiffs argue that county jurisdiction unlawfully infringes on tribal sovereignty, and is preempted.

A. The Federal Cable Act

Congress may authorize state regulation on a reservation, but must do so expressly. The general rule is that state laws are not applicable to Indians on Indian reservations, except where Congress has expressly provided that state laws apply. *Bryan v. Itasca County*, 426 U.S. 373, 96 S. Ct. 2102, 2105 n.2, 48 L.Ed.2d 710 [3 Indian L. Rep. a-55] (1976). Statutes will not be construed to abrogate Indian sovereignty rights absent a clear indication of congressional intent. *Bryan*; *E.E.O.C. v. Cherokee Nation*, 871 F.2d 937, 939 [16 Indian L. Rep. 2126] (10th Cir. 1989).

The Cable Act provides that "a cable operator may not provide cable service without a franchise." 47 U.S.C. § 541(b)(1) (1995 Supp.). 47 U.S.C. § 541(a)(1) provides that "A franchising authority may award. . . 1 or more franchises within its jurisdiction" (1995 Supp.). "Franchise" is defined as "an initial authorization, or renewal thereof. . .issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system." 47 U.S.C. § 522(9) (1995 Supp.). "Franchising authority" means "any governmental entity empowered by Federal, State, or local law to grant a franchise." 47 U.S.C. § 522(10) (1995 Supp.).

The Cable Act does not authorize county franchise authority on the reservation merely because parts of the reservation lie within the county. Generally, a county is not considered to have jurisdiction over a reservation. *See, e.g., Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 663 [2 Indian L. Rep. No. 11, p. 21] (9th Cir. 1975) ("extension of local jurisdiction is inconsistent with tribal self-determination and autonomy. . .tribal governments have long been thought and held to have inherent sovereign powers of government within Indian Country").

Nor does the Cable Act preclude the tribe from acting as a "franchise authority" within the meaning of the statute. The defendants argue that the language "empowered by Federal, State, or local law" clearly contemplates an affirmative grant of authority by such law, as in A.R.S. § 9-506(A), and that with respect to "State or local law," Congress understood that reference to mean exclusively cities, counties, and states.

However, nothing in the statute's legislative history suggests such an intent. The statute and its legislative history never mention Indian tribes, and the more logical inference from this silence is that Congress simply did not consider the possibility of an Indian tribe as a franchising authority. *See, e.g., Burlington Northern Railroad Co. v. Blackfeet Tribe*, 924 F.2d 899, 905 [18 Indian L. Rep. 2005] (9th Cir. 1991) (rejecting argument that Congress' failure to mention Indian tribes in a comprehensive regulatory scheme was a clear indication of Congress' intent to divest tribes of their authority to tax a railroad). "The silence as to Indian tribes does not 'clearly' indicate Congress intended to restrict tribal taxation; more likely, it indicates Congress did not consider the subject." *Id.* This conclusion is even more likely in light of the novelty of this particular issue. No reported cases have addressed regulation of cable television on reservations.

Cox Cable Communications, Inc. v. United States, 992 F.2d 1178, 1181 (11th Cir. 1993) lends further support to the conclusion that Congress did not intend to exclude Indian tribes from the definition of "franchising authority." In that case, the Eleventh Circuit found that the Air Force was a "franchising authority" within the meaning of the Cable Act.

> The Air Force has considered itself a franchising authority since at least 1985...Had Congress intended to exclude the Air Force from the class of government organizations authorized to award franchises, it had an ideal opportunity to do so in conjunction with its alteration of franchising regulations in the Cable Competition Act. We find nothing in the Act to suggest that Congress wished to reverse the Air Force's status as a franchising authority. We therefore conclude that the Air Force is a franchising authority within the meaning of the Cable Competition Act.

Id. at 1181. A similar argument would extend to the tribe's authority.[1]

> Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self government...Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations"...They have power to make their own substantive law in internal matters...and to enforce that law in their own forums.

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S. Ct. 1670, 56 L.Ed.2d 106 [5 Indian L. Rep. A-55] (1978). The tribe retains inherent sovereign authority to regulate cable television on the reservation, and the Cable Act has not divested the tribe of this authority.

The tribe's constitution provides that the tribal council has the power

> (I) To negotiate permits and leases, subject to approval of the Secretary of Interior, for business, homesite and other purposes, and generally to provide for proper use and development of all tribal lands, natural resources, and other tribal property.
>
> ....
>
> (L) Enact ordinances to regulate the use of all reservation lands through zoning, taxation and otherwise.
>
> (M) To manage and control community property, community enterprises and other economic projects and programs of the Fort Mojave Tribe.

Art. IV, § 1, plaintiffs' exh. A.

The tribe's Public Utilities Ordinance was adopted pursuant to the tribal council's authority to act in all matters that concern the tribe's general welfare and provide for use and development of tribal lands and natural resources. Plaintiffs' exh. Q. Section 101.003(3)(a) defines "Public Utility" as "Electrical systems, natural gas systems, water systems, waste systems, telephone and telegraph systems and such other systems designated by the Tribal Council."

B. Infringement/Preemption Analysis

In the absence of a federal statute expressly authorizing state regulation, the question is whether state regulation is preempted by federal law. When on-reservation conduct involves both Indians and non-Indians, courts apply a balancing test:

> "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state regulatory authority would violate federal law."

In re Blue Lake Forest Products, Inc., 30 F.3d 1138, 1142 [*see* 21 Indian L. Rep. 2157] (9th Cir. 1994) (quoting *White Mountain Apache Tribe*, 100 S. Ct. at 2584).[2]

There is a strong federal interest in promoting tribal self-government and economic development. *See, e.g., Crow Tribe of Indians v. Montana*, 819 F.2d 895, 898 [14 Indian L. Rep. 2097] (9th Cir. 1987) ("Congress attaches great significance to the 'firm federal policy of promoting tribal self-sufficiency and economic development' ").

The Ninth Circuit has also recognized a federal interest in the development and leasing of tribal land. In *Segundo v. City of Rancho Mirage*, 813 F.2d 1387 [14 Indian L. Rep. 2085] (9th Cir. 1987), the Ninth Circuit found that a city could not enforce its rent control ordinance on a reservation. The court noted that there is comprehensive federal regulation by the Secretary of the Interior of the leasing of Indian lands. *See* 25 U.S.C. § 415(a). Lands may be leased by Indian owners with approval by the Secretary; the Secretary must perform a detailed consideration of the lease provisions to determine whether a lease furthers the best interests of an Indian owner. The court found that concurrent local jurisdiction over leases would disrupt the federal regulatory scheme and " 'threaten Congress' overriding objective of encouraging tribal self-government and economic development.' " 813 F.2d at 1393. *See also Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1411 [19 Indian L. Rep. 2115] (9th Cir. 1992).

In this case as well, such a regulatory scheme is implicated. Pursuant to 25 U.S.C. § 323 *et seq.* and 25 C.F.R. § 169 *et seq.*, rights-of-way on the reservation must be consented to by the tribe and granted by the Secretary of the Interior.

The Ninth Circuit has often recognized that a tribe's efforts to develop its land and to generate revenue constitute a strong tribal interest to be considered in the balancing test. In *Gila River Indian Community v. Waddell*, 967 F.2d 1404 (9th Cir.

[1]The question whether the Cable Act—in particular its prohibition of anti-competitive conduct—will apply on the reservation is not properly before the court at this time.

[2]Supreme Court cases suggest that a balancing test would apply in this instance, because the case involves a county burden on Indians in the context of their dealings with non-Indians. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083, 1092, 94 L.Ed.2d 244 [14 Indian L. Rep. 1008] (1987).

1992), the court found a state could not tax the proceeds from the sale of tickets and concessions at recreational facilities on a reservation (the facilities were owned and developed by the tribe, but leased to non-Indian entities):

> That a tribe plays an active role in generating activities of value on its reservation gives it a strong interest in maintaining those activities free from state interference and distinguishes its situation from that of tribes which simply allow the sale of items such as cigarettes to take place on their reservation.

Id. at 1410.

Similarly, in *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 [21 Indian L. Rep. 2235] (9th Cir. 1994), the Ninth Circuit found that a state license fee on off-track betting on a reservation was precluded, even though the tax burden fell directly on a non-Indian racing association. The court emphasized that the tribe played an active role in generating activities of value on the reservation. *Id.* at 434-35.

The tribe has undertaken a comprehensive scheme for developing its reservation lands. Since the mid-1980s, the tribe has engaged in large-scale commercial and residential development on the reservation. In January 1995, the tribe's Avi Casino and Hotel opened to the public. The casino is located on the Nevada portion of the reservation but a bridge across the Colorado River links it to the Arizona portion. The development of the casino, roadways, bridge, and other infrastructure improvements were funded by a 33 million dollar loan to the tribe, 90 percent guaranteed by the Bureau of Indian Affairs, pursuant to the Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.* The plaintiffs argue that the provision of efficient cable television services is an integral part of this development scheme.

Rice v. Rehner, 463 U.S. 713, 725, 103 S. Ct. 3291, 77 L.Ed.2d 961 [10 Indian L. Rep. 1057] (1983)—cited by the defendants—is distinguishable. In *Rice*, the Supreme Court viewed tribal interests narrowly in determining that a state could require an Indian store owner to obtain a state liquor license to sell alcohol on the reservation. "[T]radition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians." 103 S. Ct. at 3296. The defendants have argued that, similarly, there is no tradition of tribal sovereignty in the area of cable television service.

However, the analysis in *Rice* was tailored to the area of liquor regulation. The court specifically found that there was a "Congressional divestment of tribal self-government in this area," and that in light of that development, states have been permitted and required to regulate liquor transactions. There is a "historic tradition of concurrent state and federal jurisdiction over the use and distribution of alcoholic beverages in Indian Country." *Id.*

Moreover, the tribe's interest in self-government and the control of tribal lands is particularly strong in this case, which implicates the tribe's authority to regulate utilities on the reservation. The tribal constitution authorizes the tribal council to provide for the proper use and development of tribal lands and to enact ordinances to regulate the use of tribal lands. The tribe has enacted a Public Utilities Ordinance. If the county is permitted to issue franchises for on-reservation cable service, this could preclude enforcement of the tribe's ordinance and nullify the tribe's authority to regulate the use of its lands. *See, e.g., Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1393 (9th Cir. 1987) (finding city rent control ordinances would preclude enforcement of a conflicting tribal ordinance and would nullify the tribe's authority to regulate the use of its lands).

The county's asserted interests primarily relate to its wish to be compensated for use of its rights-of-way. It is undisputed that cable operators providing on-reservation service will have to use the county rights-of-way. The defendants claim that FMTV's on-reservation service is likely to result in greater use of county rights-of-way by FMTV—as well as more disruption and inconvenience associated with the installation, maintenance, and repair in the rights-of-way—than if FMTV were serving only non-reservation lands. The county also argues that FMTV will benefit from the county's television improvement district, which rebroadcasts signals from television stations in big cities. The county argues that if cable operators charge off-reservation subscribers for these channels, the county receives five percent of the charges as a result of the five percent fee on gross receipts, and is thereby compensated for the service. If FMTV does not have to pay a fee for on-reservation service, the county will not receive this compensation.[3]

There is no question that the county should be compensated for use of its rights-of-way. However, as discussed in more detail below, it is not necessary that this compensation be incident to franchise authority over the reservation.

The defendants further assert an interest in preventing anti-competitive conduct. Section 16.D of the county's license agreement provides that the county has a public policy of promoting competition and a level playing field and preventing one cable operator from obtaining an unfair advantage. The defendants make a number of allegations of anti-competitive practices by the tribe or FMTV in connection with cable television.[4] However, this issue is speculative and is not properly before the court at this time. Moreover, although the court does not determine at this time whether or not the Cable Act applies on the reservation, that statute's prohibition of anti-competitive conduct would provide a basis for relief if problems did arise.

The court concludes that the county's interests—primarily related to compensation for use of its rights-of-way—are outweighed by the strong federal and tribal interests implicated by these circumstances.

The defendants have referred the court to a recent Ninth Circuit decision which, they argue, is a more appropriate model for analysis in this case. *See Salt River Pima-Maricopa Indian Community v. Waddell*, _____ F.3d _____, 1995 WL 124615 [*see* 22 Indian L. Rep. 2096] (9th Cir. 1995). That case involves a state tax on sales and rentals by non-Indian businesses selling products and services to non-Indians at the Scottsdale Pavilions Shopping Center, which is located on the community's reservation. The community did not share in the mall's profits or rents, but it taxed gross receipts at the mall.

The community argued that the state tax interfered with its right to impose taxes. Applying the balancing test, the Ninth Circuit found that "When state taxes are imposed on the sale of non-Indian products to non-Indians. . . the preemption balance tips toward state interests." The court found that the goods and services sold were non-Indian and that the legal incidence of the state tax fell on non-Indians. Moreover, the court emphasized that the state—rather than the tribe—provided the majority of the governmental services used by the taxpayer.

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[3]Plaintiffs note that residences that don't subscribe to cable still receive these stations. Moreover, cable operators serving customers in Laughlin, Nevada and Needles, California use these signals without being assessed a franchise fee based on gross receipts in Needles or Laughlin.

[4]For example, the defendants claim that the chairman of FMTV and FMTI, Jim Rutherford, told Dimension Cable that FMTI would allow access to a right-of-way for off-reservation service only if Dimension entered a non-compete agreement with FMTI.

The court distinguished the *Gila River* case, because in that case the tribe's activities had contributed value to the service sold; the tribe had an active role because it developed and marketed on-reservation entertainment to the general public; and the tribe shared in the profits of the enterprise. In this case, the court found, the community contributed little to the value of products and services sold, the businesses were managed and owned by non-Indians, and the community did not participate in decisions or share in profits.

> The federal government has expressed an interest in assisting tribes in their efforts to achieve economic self-sufficiency. However, that interest does not, without more, defeat a state tax on non-Indians. The community has an interest in raising revenues, but that interest is at its weakest when goods are imported from off-reservation for sale. The state, too, has an interest in raising revenues, and this interest is at its strongest when non-Indians are taxed, and those taxes are used to provide them with government services.

The defendants argue that in the instant case as well, what is at issue is a non-Indian product—cable television—that will be provided to mostly non-Indian subscribers on the reservation.

However, this case is distinguishable from the *Salt River Pima-Maricopa* case in several ways. First, while the businesses in that case were owned and managed by non-Indians and the community did not participate in business decisions, FMTV is 51 percent tribe-owned. Moreover, the tribe has a stronger interest in acting as a franchising authority on the reservation than the community had in resisting a tax on non-Indian businesses in the *Salt River* case. The authority to issue franchises implicates the authority to control and develop reservation land and to make decisions that could infringe upon the tribe's right to self-government.

This case differs from most of the infringement/preemption cases, which tend to be tax cases. The case implicates more than the county's wish to charge a use fee or tax based on on-reservation activity. The central issue is the tribe's sovereign authority to regulate cable television, and other utilities, on the reservation. Tribal interests have more weight in this case than they did in a case such as *Salt River Pima-Maricopa Indian Community v. Waddell.*

With these interests in mind, the court concludes that the county does not have authority to issue franchises for cable television service on the reservation.

C. County's Fee and Enforcement of Anti-Competition Provision

The county has argued that even if the court concludes that the county lacks jurisdiction to issue franchises for on-reservation cable service, the court should permit the county to (1) enforce section 16.D of its license agreement, which prohibits anti-competitive conduct, and (2) collect a fee totalling five percent of on-reservation receipts for use of county rights-of-way.

If the county is not the franchising authority on the reservation, it has no authority to enforce its license agreement. As noted previously, the federal Cable Act—if it applies on the reservation—prohibits anti-competitive conduct. Moreover, the existence of anti-competitive conduct by either FMTV or the tribe is not properly before the court for consideration.

The tribe charges non-Indian cable operators for easements across reservation lands at section corners in the checkerboard areas for the purpose of providing off-reservation cable television service. The tribe recently passed a tribal resolution granting Americable eight easements across tribal land for 25 years at a cost of $12,000.00. Common sense dictates that the county is also entitled to charge a fee for use of its rights-of-way. However, there is no basis at this time for the court to determine what that fee should be.

III. Conclusions

Accordingly, for the reasons previously set forth,

It is ordered granting plaintiffs' motion for partial summary judgment (dkt. 28).[5]

It is further ordered denying defendants' cross-motion for partial summary judgment (dkt. 41).

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MESCAL, et al. v. UNITED STATES, et al.

No. CIV 83-1408 LH/WWD (D.N.M., June 2, 1995)

Summary

In an action concerning ownership rights of mineral interests in allotted lands, the District Court for the District of New Mexico imposes sanctions on an attorney for the United States.

Full Text

Before HANSEN, District Judge

Memorandum Opinion

This matter comes before the court, *sua sponte*, on the court's order and notice of hearing (docket no. 636), wherein the court directed that the government show cause why sanctions should not be imposed against federal defendants' counsel, Pamela West, and/or the United States of America, for violations of the court's prior orders. Having reviewed the submissions and arguments of the parties, and having thoroughly considered the applicable law and the prior orders of this court, the court finds that the federal defendants—acting through counsel Pamela West of the United States Department of Justice—have intentionally violated the explicit mandates of three scheduling orders of this court in order to obstruct the administration of justice in this case and cause a nearly one-year delay in the progress of this litigation. The court finds that sanctions under Fed. R. Civ. P. 16(f) are appropriate and should be imposed against Pamela West, individually, and against the United States Department of Justice.

Background

Litigation in this case began over a decade ago on August 31, 1983. The parties dispute ownership rights of mineral interests for allotted lands in New Mexico. On August 25, 1989, Judge Campos entered a Rule 16(b) pretrial scheduling order, directing that the litigation proceed in three separate phases: 1) an "Initial Phase"; 2) a "Liability Phase"; and, 3)

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[5]The motion is granted only to the extent that it sought determination of whether the county had franchise jurisdiction on the reservation. The court does not determine at this time the plaintiffs' "unreasonable refusal" claim, which implicates questions of fact.